

COUNCIL OF THE DISTRICT OF COLUMBIA
KWAME R. BROWN, CHAIRMAN
1350 PENNSYLVANIA AVENUE, NW
WASHINGTON, D.C. 20004
(202) 724-8032

September 7, 2011

Dear Colleagues:

I write today to advise you of a change to our internal ethics procedures. As discussed below, beginning this fall, the Council's Office of the General Counsel (OGC) will require all Council employees (and Councilmembers) to file confidential financial statements of interest in order to avoid potential conflicts of interest and to ensure compliance with local and federal laws.

I expect that there will be many questions about this change. Accordingly, I have asked the General Counsel to hold a training session early next week that will be open only to Councilmembers and Chiefs of Staff.¹

BACKGROUND

The Council and its staff have long complied with the requirement that certain Council employees file public Financial Disclosure Statements with the Office of Campaign Finance. The Council should also comply with the District Personnel Manual's (DPM) requirement that all employees who are "performing policy-making, contracting, or purchasing functions, or functions in which meaningful decisions are made respecting private organizations," submit annual statements of employment and financial interests.

The purpose of this requirement is to permit the Council to determine whether a subordinate has a financial conflict of interest. Moreover, this requirement is needed to ensure that the OGC can provide meaningful advice to Councilmembers and staff related to their obligations under section 601 of the District of Columbia Campaign Finance Reform and Conflict of Interest Act, D.C. Official Code § 1-1106.01, and 18 U.S.C. § 208, the federal conflict of interests law. (See attached memorandum of the General Counsel).

WHAT IS REQUIRED?

Section 1813 of the DPM requires designated employees to file, on an annual basis, a "Confidential Statement of Employment and Financial Interests." That form will require an employee to provide detail information about the employee's financial interests, including stocks, trusts, and real property.

¹ The meeting will be "closed" in accordance with paragraphs (4) and (12) of section 405(b) of the Open Meetings Act, D.C. Official Code § 2-575(b)(4), (12).

When a designated employee files the Confidential Statement, the agency head (delegated in this case to the OGC) must review it and make it part of the employee's official personnel record. Finally, the Confidential Statement must be "held in strictest confidence and . . . retained in limited access files under the control of the agency head for no less than three (3) years." (Emphasis added).

In addition to the annual reporting requirement, the DPM requires an employee to file a supplementary statement if there is any change with respect to the employee's financial interests or if the employee is "transferred, promoted, or detailed to a position that is subject to these reporting requirements," within 10 days.

WHO IS REQUIRED TO FILE?

The DPM requires all employees who perform "policy-making, contracting, or purchasing functions, or functions in which meaningful decisions are made respecting private organizations" to file a Confidential Statement. At least initially, the OGC has suggested that we err on the side of caution and require *all* Council employees to file, unless an employee seeks a waiver for filing. I have directed the General Counsel to grant waivers for good cause and upon a determination that the employee is unlikely to perform any functions that would potentially lead to a conflict of interest.

WHAT IS THE TIMEFRAME FOR IMPLEMENTATION?

Given the expected volume of filings, the OGC will start accepting filings beginning on September 15th, with a filing deadline of October 1st. After the October 1st deadline, the OGC will complete its review by October 17th and certify that the filings are complete.

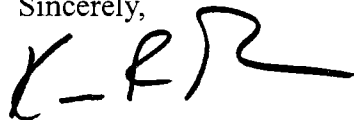
WILL THIS INFORMATION BE PUBLICLY AVAILABLE?

No. In fact, under the regulations, it must be held in the "strictest confidence." The OGC will keep the Confidential Statement in a locked file cabinet, and the Statement will not be provided to any person, except to the employee's personnel authority, upon request.

So, for example, if a Councilmember needed to review an employee's file, the OGC would provide it. But if a member of the public or another Councilmember asked for the file, disclosure would be prohibited.

Thank you for your attention to this matter. If you have any questions, please contact V. David Zvenyach, General Counsel, at 202-724-8026.

Sincerely,

A handwritten signature in black ink, appearing to read "K-RB", written over a horizontal line.

Kwame R. Brown


CC: Chiefs of Staff
V. David Zvenyach, General Counsel
Jen Budoff, Budget Director
Nyasha Smith, Secretary
Chris Warren, Chief Technology Officer

OFFICE OF THE GENERAL COUNSEL
COUNCIL OF THE DISTRICT OF COLUMBIA

1350 Pennsylvania Avenue NW, Suite 4, Washington, DC 20004 • (202) 724-8026

MEMORANDUM

To: Councilmembers
From: V. David Zvenyach, General Counsel
Date: September 7, 2011
Re: Applicability of conflict-of-interest statutes



Due to an apparent lack of consistency in interpretation, I write regarding the applicability of the federal and local conflict-of-interest statutes. This memorandum is not meant to be exhaustive. Rather, I hope that this memorandum will help clarify the major points associated with the relevant statutes. As the Ethics Counselor to the Council, I am available to answer any questions you have about these provisions. In addition, in a forthcoming Ethics Manual, I anticipate providing additional examples and information about the statutes in a more accessible format.

APPLICABLE STATUTES

There are two conflict-of-interest statutes that apply to Councilmembers and a significant number of staff in the Council. The first—a federal statute¹—applies to all Councilmembers and Council staff. The second—the local statute²—applies to all Councilmembers, and all staff receiving a salary greater than \$72,100. The statutes are discussed below.

Federal Statute

The federal conflict-of-interest statute, which applies to all Councilmembers and employees, provides in relevant part that a District employee may not:

[Participate] personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a . . . particular matter in which, to his knowledge,

¹ 18 U.S.C. § 208.

² Section 601 of the District of Columbia Campaign Finance Reform and Conflict of Interest Act of 1974, approved August 14, 1974 (88 Stat. 467; D.C. Official Code § 1-1106.01)

he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest.³

Under this statute, an employee may not take substantial, affirmative conduct with respect to any “particular matter” that would have a “direct and predictable effect” on the employee’s personal financial interest or an “imputed” interest. These elements are discussed below.

Particular Matter

Under the implementing regulations, the definition of a *particular matter* “encompasses only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons.”⁴

The regulations explicitly include legislative and policy-making activities that are “narrowly focused on the interests of such a discrete and identifiable class of persons.” It does not cover “the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons.”

In other words, if legislation is likely to affect a large number of individuals, it is not covered under the statute. If legislation is aimed at a discrete group, the statute would apply.

Direct and Predictable Effect

Another requirement under the federal conflict-of-interest statute is that the action must have a *direct and predictable effect* on the financial interest in question.

Under the implementing regulations, these requirements are treated separately. A *direct effect* exists if “there is a close causal link between any decision or action to be taken in the matter and

³ 18 U.S.C. § 208(a).

⁴ 5 C.F.R. § 2635.402(b)(3).

any expected effect of the matter on the financial interest.”⁵ A *predictable effect* exists where there is a “real, as opposed to a speculative possibility that the matter will affect the financial interest.”⁶

Accordingly, the statute does not apply if a financial interest might be affected by an action. Rather, the statute applies only if it is *highly likely* that a financial interest will be affected.

Imputed Interests

It is important to note that the conflict-of-interest statutes cover more than personal financial interests. Both the federal and local statutes cover *imputed* financial interests. The federal conflict-of-interest statute imputes the financial interests of the following to the employee as if it were his or her own:

- The employee’s spouse;
- The employee’s minor child;
- The employee’s general partner;
- An organization or entity which the employee serves as officer, director, trustee, general partner or employee; and
- A person with whom the employee is negotiating for or has an arrangement concerning prospective employment.

For example, if an employee’s spouse has a financial interest that would be affected by a particular matter, the employee may not participate in those matters.⁷ Similarly, if an employee is an officer of an organization,⁸ she may not participate in a particular matter that would affect the organization’s financial interest.

⁵ 5 C.F.R. § 2635.402(b)(1).

⁶ *Id.*

⁷ Although not discussed in this memorandum, Council employees may be able to seek a waiver where the financial interest is “not so substantial as to be deemed likely to affect the integrity of the employee’s services to the Government.” 18 U.S.C. § 208(b)(1). This waiver does not appear to be available to Councilmembers.

⁸ The federal statute applies to both for-profit and not-for-profit organizations.

Local Statute

The local conflict-of-interest statute, which applies to all Councilmembers and many Council staffers, provides in relevant part that:

No public official shall use his or her official position or office to obtain financial gain for himself or herself, any member of his or her household, or any business with which he or she or a member of his or her household is associated, other than that compensation provided by law for said public official. This subsection shall not affect a vote by a public official: (1) On any matter which affects a class of persons (such a class shall include no less than 50 persons) of which such public official is a member if the financial gain to be realized is de minimus [sic]; (2) on any matter relating to such public official's compensation as authorized by law; or (3) regarding any elections law.⁹

In most respects, the local statute is similar to the federal conflict-of-interest statute. For example, the Office of Campaign Finance has held that the statute incorporates the “direct and predictable effect” test of the federal conflict-of-interest statute.

Although the local statute is similar to the federal statute, the major differences are found in the interests that are imputed to the individual.

Imputed Interests under the Local Statute

Under the local statute, the following interests are imputed to the employee:

- The employee’s spouse or domestic partner and any parent, brother, or sister, or child of the [employee], and the spouse or domestic partner of any such parent, brother,

⁹ D.C. Official Code § 1-1106.01(b).

sister, or child that reside in the same household as the employee.

- Any for-profit organization in which “the person or member of his or her household is a director, officer, owner, employee, or holder of stock worth \$1,000 or more at fair market value, and any business which is a client of that person.”

In some respects, this statute is notably broader than the federal conflict-of-interest statute. For example, if an employee lives with her brother, and that employee is aware that the brother has more than \$1,000 in stock of a for-profit corporation, the local statute prohibits the employee from taking any official action that would affect the financial interest of that corporation. Similarly, the local statute differs from the federal statute because it automatically imputes the interest of a corporation in which an employee holds stock, even if there is no direct and predictable effect on the employee’s personal financial interest.

CONFIDENTIAL REPORTING

To help avoid unintentional violations of both the federal and local conflicts-of-interest statute, the Chairman has directed me to prepare and review confidential financial disclosure forms, so that my office can provide guidance about when recusal or disclosure under the local statute may be necessary to avoid conflicts of interest. For more information about this process, please see the Chairman’s memorandum that accompanies this memorandum.

CONCLUSION

As mentioned above, the federal and local conflict-of-interest statutes have been the subject of some confusion, particularly due to their differing scopes. If you have any questions about the applicability of either statute in a particular situation, please do not hesitate to contact me.

Thank you for your attention to this matter.



COUNCIL OF THE DISTRICT OF COLUMBIA
1350 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, DC 20004

Mary M. Cheh

Councilmember, Ward 3
Chair Pro Tempore
Chair, Committee on Government Operations and the Environment

Office (202) 724-8062
Fax (202) 724-8118
mcheh@dccouncil.us
www.marycheh.com

September 8, 2011

Dear Colleagues:

Like you, this morning I received memoranda from both Chairman Brown and General Counsel Zvenyach regarding a new scheme of confidential financial disclosures to bring our practices in line with the requirements of 18 U.S.C. § 208. Although there may be a great deal of merit in adopting such a scheme, there is an important legal question that needs to be resolved first: are we, as a legislative body, governed by the dictates of that statute, which applies more generally to the federal executive. On my reading of the law, we are not covered, and I will be sending along a letter in the coming days that sets out the legal issue in more detail. In the meantime, though, I believe that we should be cautious in allowing ourselves to be swept up in a much larger regulatory mechanism, which may be a good model for us, but over which we have no control.

Indeed, if the Chairman or this body wants to direct that we engage in disclosure and protection against conflicts that the federal law envisions, and so directs as our initiative, I would support it. But we have enough federal interference in the operation of our local government without actively seeking to increase it.

Sincerely,

A handwritten signature in black ink, appearing to read "Mary M. Cheh".

Mary M. Cheh